STATE OF MICHIGAN

COURT OF APPEALS

MARK LAMB, and TAMMY LAMB, his wife, and TAMMY LAMB, as mother of MATTHEW LAMB, ZACHARY LAMB and LARA LAMB, minor children,

Plaintiffs,

v

BARTON MALOW, INC., A.M. ELECTRIC, JOHN E. GREEN COMPANY, GENERAL MOTORS CORPORATION, and VULCAN IRON WORKS, INC., jointly and severally,

Defendants,

and

GENERAL MOTORS CORPORATION,

Cross/Third-Party Plaintiff-Appellee,

v

BARTON MALOW and VULCAN IRON WORKS, INC., jointly and severally,

Cross/Third-Party Defendants,

and

A.M. ELECTRIC and JOHN E. GREEN COMPANY, jointly and severally,

Third-Party Defendants,

and

UNPUBLISHED
November 3, 2000

No. 211700
Wayne Circuit Court
LC No. 91-117986-NO

TEAM MANAGEMENT, INC.,

Third-Party Defendant-Appellant.

Before: Owens, P.J., and Kelly and Hoekstra, J.J.

PER CURIAM.

Third-party defendant Team Management, Inc. ("TMI"), appeals as of right from judgment entered in favor of third-party plaintiff General Motors Corp. ("GM") following a jury trial in this action brought by GM for indemnification. We affirm.

This case involves an action in which GM sought indemnity pursuant to a construction contract entered into by GM and TMI. The original lawsuit filed in 1991 arose from an accident where Mark Lamb, president and sole stockholder of TMI, sustained injuries while providing construction management support services on a GM construction project. Although not originally listed as a defendant, GM was added as a defendant in an amended complaint. Thereafter, GM filed a cross-complaint and third-party complaint for indemnification. Ultimately, plaintiffs in the original lawsuit settled separately with defendants, including a $1.1 million settlement with GM, and plaintiffs' action was dismissed.

However, relevant to the instant appeal, the trial court granted TMI's motion for summary disposition against GM with regard to the third-party complaint, ruling that the indemnification clause at issue was unenforceable as a matter of law. GM appealed that decision to this Court. In Docket No. 171809, this Court reversed, holding that the term governing the applicability of the indemnity clause, "labor", is ambiguous, and remanded to allow the finder of fact to determine the parties' intent. This Court denied rehearing and the Supreme Court denied leave to appeal.

On remand, additional discovery took place and GM filed a motion in limine seeking to exclude evidence of Lamb's injury and of negligence by GM, which the trial court granted. The case proceeded to trial to determine whether the parties' intent in signing the purchase order to provide construction management services was for TMI to indemnify GM against all liability arising from the performance of the contracted services. After a jury trial, the trial court entered a $700,000 judgment in favor of GM on February 18, 1998.

TMI first argues that the trial court erred in granting GM's motion in limine, thereby excluding TMI's evidence that Lamb's injuries and GM's subsequent settlement with Lamb resulted from the sole negligence of GM and were not "growing out of" TMI's performance of the purchase order (contract). We disagree. "We review a trial court's decision concerning the admission of evidence for an abuse of discretion." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996). "An abuse of discretion is found only in extreme cases where the result is so

palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999).

TMI claims that evidence of GM's negligence was critical to TMI's defense and relevant to show that GM was solely negligent in this case, and thus MCL 691.991; MSA 26.1146(1) was violated. TMI further claims that there was abundant evidence that GM alone had sufficient knowledge and control to have prevented Lamb's injury. TMI argues that proof of GM's negligence and TMI's freedom from negligence was relevant to establish that indemnification was never intended under these circumstances and indemnification would violate MCL 691.991; MSA 26.1146(1).

TMI's argument that indemnification would violate MCL 691.991; MSA 26.1146(1) is untenable. MCL 691.991; MSA 26.1146(1) provides that an agreement in a construction contract "purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons . . . caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable." While TMI argues that evidence of GM's sole negligence and TMI's lack of negligence would show a violation of this provision, the record does not support TMI's claim of GM's sole negligence. Here, the record indicates that the original plaintiffs sought recovery for negligence from five parties, including GM, indicating that Lamb's injuries were not caused by the sole negligence of any of defendants. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 601-602; 513 NW2d 187 (1994). Moreover, deposition testimony from Lamb, the injured party and the designated representative of TMI, indicated that others beside GM were negligent. Thus, the record indicates that Lamb's injuries were not caused by the sole negligence of GM.[1]

Further, the record reveals that the trial court limited the case to evidence relevant to the intent of the parties, pursuant to this Court's order. In a previous appeal of the trial court's grant of summary disposition in favor of TMI with regard to GM's indemnification claim, this Court reversed and remanded to allow the finder of fact to determine the intent of the parties (*Lamb v Barton Malow, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 4/12/96 (Docket No. 171809)). When determining the intent of the parties, the trier of fact may consider the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995).

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[1] To the extent that TMI relies on the language of *Smith v O'Harrow Construction Co*, 95 Mich App 341; 290 NW2d 141 (1980), in support of its position that GM's net liability to Lamb could only reflect the extent to which GM's sole negligence caused Lamb's injuries, and submits that *Fischbach-Natkin Co v Power Press Piping, Inc*, 157 Mich App 448; 403 NW2d 569 (1987) and *Burdo v Ford Motor Co*, 588 F Supp 1319 (Ed Mich, 1984) were wrongly decided, TMI's argument is unpersuasive. See *Chrysler Corp v Skyline Indus Services, Inc*, 448 Mich 113, 130; 528 NW2d 698 (1995) ("The appropriate focus is thus on the injury as a whole, rather than the portion of damages attributable to the indemnitee").

With regard to indemnity provisions, this Court explained in *Fischbach-Natkin Co v Power Press Piping, Inc*, 157 Mich App 448, 452-453; 403 NW2d 569 (1987):

> [B]road, all-inclusive indemnification language may be interpreted to protect the indemnitee against its own negligence if such intent can be ascertained from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties. Thus, although an indemnity provision does not expressly state that the indemnitee will be shielded from its own negligence, such language is not mandatory to provide such indemnification. [Footnote omitted.]

Here, the question of whether GM was negligent has no bearing on the intent of the parties when signing the contract containing the indemnification clause. The only relevance of GM's negligence would be that if GM were solely negligent, then the contract provision would violate MCL 691.991; MSA 26.1146(1). Upon review of the record, we conclude that there is sufficient evidence of negligence by other parties to support the trial court's conclusion that GM's negligence is irrelevant to the matter to be determined. Under these circumstances, evidence of Lamb's injuries and GM's possible negligence are not relevant to the intent of the parties when contracting for TMI's services through a purchase order. With this record, the trial court was within its discretion in limiting the evidence presented at trial because the evidence did not support a conclusion that GM was solely negligent, nor did evidence of negligence assist in determining the intent of the parties when entering the contract.

TMI next argues that the trial court erred in denying reasonable cross-examination of Bruce Price and limiting the scope of cross-examination, by unfairly assuming the role of an advocate, by denying offers of proof, and by denigrating TMI's legal theories in the jury's presence, all of which demonstrated the appearance of bias against TMI and denied TMI a fair trial. We disagree.

The trial court has the discretion to control the questioning of witnesses, and we review the trial court's determination of the scope of cross-examination for an abuse of discretion. *Persichini v William Beaumont Hospital*, 238 Mich App 626, 632; 607 NW2d 100 (1999). This Court reviews the trial court's conduct to determine whether the complaining party was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In a criminal case, this Court explained:

> A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. [*Paquette, supra* at 340 (citation omitted).]

Here, TMI focuses its argument on the alleged bias of the trial court, and proffers one aspect of that bias as being the trial court's manner in ruling during the cross-examination of Bruce Price. TMI asserts that reversal is required because the trial court denied TMI full and meaningful cross-examination of a critical witness on critical issues. TMI claims that the trial court appeared to assume the role of

GM's counsel, citing portions of the trial transcript where the trial court interrupted TMI's cross-examination even though GM's counsel did not object.

Upon review of the record, we conclude that the trial court did not abuse its discretion in limiting TMI's cross-examination of Price. The trial court focused on the issues at hand, attempted to limit the scope of cross-examination to relevant testimony within the competency of the witness and to avoid speculation. Under these circumstances, the trial court did not abuse its discretion, and thus bias is not shown.

In further support of its argument that the trial court was biased, TMI claims that the trial court erred in refusing at least three of its requests to make an offer of proof. "While generally courts should allow a party to make a separate record regarding excluded evidence for purposes of appellate review, a court's refusal to do so does not always constitute reversible error." *Graham v Firestone Tire & Rubber Co*, 137 Mich App 215, 220; 357 NW2d 666 (1984). In *Detroit Bank & Trust Co v Dickson (After Remand)*, 86 Mich App 403, 406; 272 NW2d 660 (1978), this Court stated that "where [a] request is made to place testimony on a separate record after objection is successfully made to admission of the testimony, there must be a sufficient reason for denial of the request." The *Detroit Bank* Court concluded, however, that even though the trial court erred because there was no sufficient or good reason for the denial by the trial judge in that case, the error was harmless under the circumstances. *Id.* at 407.

Given our conclusion that the trial court did not abuse its discretion in limiting cross-examination, this Court has no need for a separate record containing TMI's proposed line of questioning. Thus, the error was harmless. Nor do we find that a trial court's failure to allow an offer of proof mandates a conclusion that the trial court was biased against that party.

To the extent that TMI argues that the trial court made remarks that disparaged TMI's legal theories and misstated the applicable law, we find this argument without merit. TMI harks back to when the trial court interrupted TMI's counsel during Price's cross-examination. In context, the trial court's comments were made seeking to return the examination to questions relevant to the issues at trial. TMI also takes issue with the trial court's statement:

> Well, you know, I don't have to be right, I just have to rule. They have a whole lot of Court of Appeals judges that they pay handsomely to figure out if I'm right, or wrong.

Read in context, this comment did not unduly influence the jury. Within the same exchange, TMI's counsel stated that it respectfully took exception to the trial court's denial of its request to give an offer of proof, which the court stated that it appreciated and acknowledged that counsel's repeated exceptions were not a problem. Because the trial court's conduct did not unduly influence the jury, TMI was not deprived of a fair and impartial trial.

Next, TMI argues that the trial court erred in refusing to grant TMI's motion for directed verdict on the ground that GM waived any factual dispute by failing to raise the issue in its response to TMI's original motion for summary disposition. In essence, TMI argues that this Court erred in allowing GM

to argue that a question of fact existed regarding the interpretation of the contract during GM's appeal of the trial court's grant of summary disposition in favor of TMI where GM allegedly did not argue such before the trial court. In effect, TMI's current argument, under the guise of an appeal of the trial court's denial of its motion for directed verdict, is a request to review a previous order of this Court. However, MCR 7.215(G)(3) provides that "[t]he clerk will not accept for filing a motion for rehearing of an order denying a motion for rehearing." Further, "[e]xcept as modified by the Supreme Court, a decision of [this] court is final." MCR 7.201(D). Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Everett v Nickola*, 234 Mich App 632, 635; 599 NW2d 732 (1999), quoting *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). "[A]s a general rule, a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals." *Id.* Under these principles, we are not at liberty to revisit the previous decision of this Court reversing the trial court's grant of summary disposition against GM, and thus TMI is not entitled to the requested relief.

Finally, TMI argues that the trial court erred in refusing to grant TMI's motion for mistrial when GM"s counsel deliberately made a false and misleading statement to the jury during rebuttal argument that may have affected the jury's ultimate decision. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini, supra* at 635; *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 64; 597 NW2d 534 (1999). "Only where the prejudicial statements of counsel reflect 'a studied purpose to inflame or prejudice a jury' is reversal warranted." *Wolak v Walczak*, 125 Mich App 271, 275; 335 NW2d 908 (1983).

In the present case, TMI claims that there was no reason or excuse for GM's counsel to say to the jury during rebuttal argument that "Team Management [TMI] in this case sued those contractors on similar indemnification provisions . . . ." TMI argues that the statement was false and was deliberately calculated to leave the impression that other contractors under similar agreements would reimburse TMI for any liability to GM. Further, defendant contends that the trial court should have informed the jury that the statement was false, rather than allowing the jury to think that the statement was true, but not supported by admitted evidence. GM concedes that its counsel made a factually erroneous comment during closing argument.

In the present case, the trial court having provided an immediate curative instruction and other relevant instructions throughout the trial, and TMI having not requested a more specific curative instruction, any error was harmless. *Kirk v Ford Motor Co*, 147 Mich App 337, 348-349; 383 NW2d 193 (1985). We conclude that GM's counsel's statement did not deny TMI a fair trial, and consequently the trial court did not abuse its discretion in denying TMI's motion for a mistrial.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra